

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DYSON TECHNOLOGY LIMITED
and DYSON, INC.,

Plaintiffs,

v.

MAYTAG CORPORATION,

Defendant.

C.A. No. 05-434-GMS

**REDACTED -
PUBLIC VERSION**

**PLAINTIFFS' MOTION *IN LIMINE* NO. 5
TO EXCLUDE EVIDENCE OF MAYTAG'S IN-HOME TESTS
AND OPENING BRIEF IN SUPPORT THEREOF**

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Dated: April 16, 2007

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I. SUMMARY OF THE ARGUMENT

Dyson Technology Limited and Dyson Inc. seek to preclude “in-home” tests of Dyson vacuum cleaners performed by Maytag expert John Balough and any related evidence.

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II. STATEMENT OF FACTS

Maytag's counsel hired John Balough, a longtime Hoover insider, to test whether "in home use" causes Dyson vacuums to lose suction. *See* Balough 2/15/2007 Dep. ("Balough 3rd Dep.") 166:18-21, 174:18-19 (Tab A); Balough Resubmitted Report, Jan. 31, 2007 ("Balough Rep.") (Tab B).

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An ASTM F608

pick-up test feeds into the machines an artificial test dust that is "[a]bsolutely not" found in typical American homes. Balough 10/27/2006 Dep. 196:8-15 (Tab F). That test dust includes 120 grams of fine talc.

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Talc is a clogging agent that can cause rapid performance failures in vacuums, as Maytag experts and others have acknowledged.

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III. ARGUMENT

Expert scientific testimony “will not be admitted unless it is derived by the scientific method and is supported by ‘appropriate validation.’” *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, No. 02-148, 2004 WL 2127192, at *10 (D. Del. Sept. 15, 2004) (Sleet, J.) (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993)); see Fed. R. Evid. 702, 703. The Third Circuit has identified the following *Daubert* factors as relevant to the reliability of novel scientific techniques:

- (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; (5)

whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 n.8 (3d Cir. 1994).

The burden is on the offering party to prove the test method's reliability by a preponderance of the evidence. *See Daubert*, 509 U.S. at 592 n.10. "[A]ny step that renders the analysis unreliable . . . renders the expert's testimony inadmissible." *Paoli*, 35 F.3d at 745. Thus, when an expert's test is a novel combination of accepted protocols, the offering party must independently establish that the adapted method is reliable. *See Elcock v. Kmart Corp.*, 233 F.3d 734, 748-49 (3d Cir. 2000) (expert required to show "novel synthesis" of two established test methods was generally accepted or bore logical relationship to accepted methods).

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IV. CONCLUSION

For the foregoing reasons, the Dyson Parties' motion to exclude Balough's in-home tests and any related evidence should be granted.

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CERTIFICATE OF SERVICE

I, Monté T. Squire, hereby certify that on April 23, 2007, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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